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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Appellant, v. ARTHUR THEODORE GIVHAN, Defendant and Respondent.	B145640 (Super. Ct. No. SA015746)

APPEAL from an order of the Superior Court of Los Angeles County, Bernard J. Kamins, Judge. Reversed.

Steve Cooley, District Attorney, George M. Palmer, Head Deputy District Attorney, and Juliet Schmidt, Deputy District Attorney, for Plaintiff and Appellant.

Steven A. Seiden and Steven K. Hauser for Defendant and Respondent.

On March 25, 1994, respondent Arthur Theodore Givhan entered a plea of nolo contendere to a charge of selling, transporting, or offering to sell cocaine in violation of Health and Safety Code section 11352, subdivision (a). On March 1, 2000, respondent filed a petition for writ of habeas corpus alleging that he had been denied due process, that false evidence was introduced in hearings which led to his incarceration, that new evidence was available that undermined the prosecution's case, that exculpatory evidence had been withheld, and that he had entered the plea unknowingly or involuntarily. The principal factor underlying the writ was the involvement in respondent's case of the infamous former Los Angeles Police Department Officer Rafael Perez. During a police sting operation that led to respondent's arrest and incarceration, Officer Perez claimed to have observed respondent hand rocks of cocaine to an intermediary in exchange for cash. After an evidentiary hearing on respondent's petition for writ of habeas corpus, the trial court concluded that Officer Perez's testimony was both untrustworthy and material, and granted the petition.

The People appeal, contending that habeas relief was inappropriate in this situation because (1) respondent failed to establish that false evidence led to his incarceration, (2) respondent's plea bargain was fully informed, intelligent, and voluntary, and (3) respondent was not entitled to habeas relief based on new evidence or the withholding of material exculpatory evidence. We agree that habeas relief based on the presentation of false evidence was inappropriate in this situation and that no other ground for habeas relief was established. We, therefore, reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1993 Information

In November 1993, a felony information was filed charging respondent and two codefendants, Dennis Charles Aggers[1] and Andre Sutton, with one count of selling, transporting, or offering to sell cocaine in violation of Health and Safety Code section 11352, subdivision (a). It was alleged that respondent had three prior convictions: (1) violation of Health and Safety Code sections 11351 and 11352 (transportation and possession of narcotics for sale); (2) violation of Penal Code section 12021, subdivision (a) (felon in possession of firearm); and (3) violation of Penal Code section 211 (robbery).

Preliminary Hearing

At the preliminary hearing that took place just prior to the filing of the information, the prosecution offered the testimony of Los Angeles Police Department Officer Ron Alberca.[2] On October 28, 1993, Officer Alberca was working undercover in the area of Saturn and La Cienega in Los Angeles. He approached Sutton in a parking lot and asked for a "30," which means $30 worth of narcotics. Sutton said, "Yeah, hold on," and walked a short distance to confer with Aggers. Aggers said, "We gotta make a call." Officer Alberca and Aggers walked to Pico and La Cienega where Aggers used a public telephone apparently to page someone. Sutton joined them and asked whether "Cadillac" had been

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[1] Aggers's name is sometimes spelled "Aggars."

[2] Officer Alberca's name is spelled "Alberqua" in the preliminary hearing transcript and "Alberca" in the reporter's transcript. We adopt the spelling found in the reporter's transcript.

called. Aggers replied in the affirmative. The two men told Officer Alberca that the person referred to was called Cadillac because he drove that type of car.

About five to ten minutes later, a Cadillac pulled into the alley and parked. Officer Alberca saw respondent step out of the driver's side of the car. The officer gave Aggers a $20 bill and a $10 bill. Aggers approached respondent, who was standing about 50 to 75 feet from where the officer was located. Testifying to hearsay for purposes of the preliminary hearing, Officer Alberca stated that Officer Perez, who was assisting with the operation, later reported seeing Aggers hand respondent cash and respondent remove off-white objects from his mouth and hand them to Aggers. From where he was standing Officer Alberca thought he saw an exchange of some type, but could not make out the details. Aggers walked back to Officer Alberca and handed him three off-white objects later established to be rock cocaine. When the trio was arrested immediately thereafter, the bills handed to Aggers by Officer Alberca were not found.

Trial

The trial transcript is not in our record, but the parties do not dispute that Officer Alberca's trial testimony tracked his preliminary hearing testimony. In addition, Officer Perez's purported observations were related by Officer Perez in person. Respondent, testifying on his own behalf, denied selling or handing cocaine to Aggers. He said that Aggers had asked for an advance on an auto detailing or car wash that Aggers was supposed to perform for respondent the next day. During deliberations, the jurors asked for a re-reading of the transcript of Officer Perez's testimony concerning what he claimed to have seen and his position in relation to Aggers and respondent when the alleged exchange took place. The jurors also asked for re-readings of testimony relating to the search that had been conducted of the alley to locate the buy money, the specifics of

respondent's arrest, and Officer Alberca's observations at the moment of the exchange.

The jury found codefendant Aggers guilty as charged and Sutton not guilty. A mistrial was declared as to respondent because the jurors could not agree on a verdict, voting eight to four in favor of conviction. Thereafter, respondent entered a plea of nolo contendere to the charge and admitted the three prior convictions. He was placed on summary probation for three years and was released from custody.

Respondent's Incarceration and Prior Appeal

In August 1998, respondent was found to be in violation of his probation and sentenced to 10 years in state prison. He appealed. This court concluded that he had been sentenced in violation of the plea bargain, causing the judgment to be modified to stay a three-year enhancement and a two-year enhancement imposed by the trial court, reducing the prison term to five years.

Habeas Petition

On December 10, 1998, respondent submitted a request to withdraw his plea based on newly discovered information that exposed criminal activity on the part of Officer Perez. The court deemed his request to be a writ of habeas corpus or writ of coram nobis. The court reviewed the preliminary hearing transcript and trial record, and ruled that respondent had presented sufficient evidence to justify an order to show cause. At that time, the court said the primary question to be addressed was whether "absent [the] information from Perez, . . . the case can stand on its own feet."

On March 1, 2000, a formal writ of habeas corpus was prepared by court-appointed counsel and filed on respondent's behalf. Respondent contended

that material false evidence in the form of the testimony of Officer Perez was introduced at the hearing that led to his incarceration. Respondent believed the following evidence established that Officer Perez's testimony was false: (1) it was contradicted by respondent's own testimony; (2) Officer Perez's story of being in a position to observe the exchange was not confirmed by two other witnesses -- Officer Alberca and a woman whose car had been blocked by respondent -- both of whom saw the encounter between respondent and Aggers but did not see narcotics or money exchanged and did not notice Officer Perez who should have been standing in their line of sight; (3) Officer Perez's recollection of certain events leading up to the exchange was contradicted by Officer Alberca's recollection; and (4) Officer Alberca's cash was not found on respondent's person after the arrest.

Respondent further contended that exculpatory evidence had been withheld, referring to the information concerning Officer Perez's admitted perjury and other misconduct. Although he had no evidence that the prosecution knew about the misconduct, respondent sought to charge the prosecution with Officer Perez's knowledge of his own defalcations. Officer Perez's criminal conduct was also raised as new evidence undermining the prosecution's case and warranting habeas relief. Respondent further contended that the introduction of Officer Perez's problematic testimony led to his decision to plead nolo contendere, which meant that his plea was not knowing or voluntary.

In a separate declaration in support of the petition, respondent reiterated the facts stated at trial -- that he received a call from Aggers, met him in the alley, refused his request for a cash advance, and drove away. He stated that he saw no one else in the alley other than Aggers and the woman whose car he blocked. He stated that he entered the nolo contendere plea because he was afraid to have a second trial and afraid his testimony would not be believed over Officer Perez's.

His trial attorney also stated in a declaration that if not for concern over the testimony of Officer Perez, respondent would not have accepted a plea bargain.

In the return to the habeas petition, the People conceded that Officer Perez lacked credibility generally, but contended that respondent had not proven that Officer Perez lied in his particular case. The People further contended that even in the absence of Officer Perez's testimony, ample circumstantial evidence supported respondent's guilt.

Hearing on Writ

An evidentiary hearing was held before the trial court. Officer Perez invoked his Fifth Amendment right against self-incrimination, and refused to answer any questions. Respondent took the stand and testified in accordance with his testimony at trial and in his declaration. He said he did not see Officer Perez in the alley. He pled guilty because it was his word against Officer Perez's, and he felt the jurors would believe the officer. The People moved to dismiss the petition based on insufficient evidence. The court denied the motion.

The People called former Detective Robert Lutz who was present in the general location when the drug buying operation took place. He said that Officer Perez's task during the operation was to cover Officer Alberca. Detective Lutz monitored a transmission device being used by Officer Perez. Detective Lutz also reviewed Officer Perez's report. He did not see where Officer Perez was physically located during the operation.

Officer Alberca was called to testify. He testified that from his vantage point, he could see respondent's hand and Aggers's hand come together, but could not tell if they exchanged anything. Aggers thereafter handed the officer an off-white rock that appeared to be cocaine. Officer Alberca did not notice where Officer Perez was during the exchange.

After hearing the evidence, the trial court granted the writ. At the hearing, the court explained that although respondent's story as to why he was in the alley was "suspect" and Officer Alberca's version of events was believable, if the jurors had been aware of the problems with Officer Perez's credibility at the time of respondent's trial, "a different result certainly could have been reached." Summarizing the evidence presented at the trial, the court said: "If you take [Officer Perez] out of the equation . . . you just have what Officer Alberca sees, you have defendant Aggers with narcotics, and no one has seen it passed to defendant Aggers, you go down, find [respondent] without the buy money that was supposedly given to him. So it is really based on the assumption by an experienced Officer Alberca that he feels a transaction went down." The court expressed doubt that either the jury or the court could have made a finding of beyond a reasonable doubt on those facts. The People appealed from the grant of the writ.

DISCUSSION

I

The People contend that because respondent agreed to plead to the charge against him, he was not entitled to habeas relief based on a claim of false evidence. Under Penal Code section 1473, subdivision (b)(1), a writ of habeas corpus is appropriate where it appears that "[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration." The People assert that Officer Perez's testimony "did not result in [respondent's] incarceration[;] [respondent's] incarceration was a result solely of his plea," and take the position that section 1473, subdivision (b)(1) should only be applied where the petitioner was found

guilty by a jury, not where false evidence introduced at a hearing or trial induced the petitioner to accept a plea bargain. We agree.

Subdivision (b) was added to section 1473 of the Penal Code in 1975. (See Stats. 1975, ch. 1047, § 2, p. 2466.) Prior to the enactment of that statutory provision, the common law rule was that "[a] judgment of conviction based on testimony known by representatives of the state to be perjured deprives the defendant of due process of law [citations] and may be attacked on habeas corpus [citations]." (*In re Imbler* (1963) 60 Cal.2d 554, 560.) To successfully attack a conviction under this rule, the petitioner was required to establish by a preponderance of the evidence all of the following: "[1] that perjured testimony was adduced at his trial, [2] that representatives of the state knew that it was perjured [citations], and [3] that such testimony may have affected the outcome of the trial. [Citations.]" (*Ibid*.)

As has long been recognized, Penal Code section 1473, subdivision (b)(1), diverged from the common law rule discussed in *Imbler* by eliminating the first and second requirements. "Under Penal Code section 1473, subdivision (b)(1), . . . , it is not required that perjury be proved. A showing of 'false evidence' is sufficient. Additionally, it is no longer necessary to show a representative of the state knew the testimony was false." (*In re Wright* (1978) 78 Cal.App.3d 788, 809, fn. 5; accord, *In re Pratt* (1999) 69 Cal.App.4th 1294, 1313-1314; *In re Hall* (1981) 30 Cal.3d 408, 424.)

The third requirement, however, was not eliminated. In *In re Wright, supra*, 78 Cal.App.3d 788, the court concluded that a petitioner seeking habeas relief under the statute, "is still required to show the false evidence may have affected the outcome of his trial . . . ." (*Id*. at p. 808.) The court explained that "the requirement under the preexisting law that the petitioner show the false evidence may have affected the outcome of his trial was not eliminated or changed by the

1975 amendment to Penal Code section 1473 and is still required for relief under the amended statute: '[f]alse evidence that is substantially material or probative on the issue of guilt or punishment' means false evidence of such significance that it may have affected the outcome of the trial . . . ." (*In re Wright, supra,* at pp. 808-809.)

Officer Perez's statement that he had observed respondent hand rocks of cocaine to Aggers in exchange for cash was introduced at the preliminary hearing, and repeated at the trial which culminated in a hung jury. Respondent then agreed to the nolo contendere plea. Respondent testified at the habeas hearing that he entered the plea after having being persuaded by defense counsel that, under the circumstances, a second jury was likely to believe Officer Perez and vote for guilt. The trial court attached a great amount of significance to this testimony, citing respondent's statement that "he made the choice of pleading guilty because he felt that . . . the jury would take the officer's word over his word" as the primary basis for denying the People's motion to dismiss.

We do not believe this indirect connection between Officer Perez's false testimony[3] and respondent's conviction justifies granting a habeas petition under Penal Code section 1473, subdivision (b)(1). The provision states that the false evidence must have been introduced against the petitioner at a hearing or trial "relating to his incarceration[.]" Because the trial resulted in a hung jury, the trial

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[3] The People have also challenged the trial court's finding that Officer Perez's testimony was false, contending that the only evidence supporting the allegation that Officer Perez lied was respondent's own suspect testimony. Although we do not resolve this issue because we do not believe habeas was available to respondent under Penal Code section 1473, subdivision (b)(1), we note that testimony from other witnesses present in the alley, particularly Officer Alberca, raised an inference that Officer Perez was not in a position to see what he claimed to have seen. This evidence was added to respondent's testimony and the uncontested information placed before the trial court

was a nullity. There was no hearing or trial that related to or led to respondent's incarceration. Respondent's incarceration was the sole result of his plea agreement.

A request to set aside a plea agreement after judgment has been entered can be attacked by a writ of coram nobis. (See *People v. Grgurevich* (1957) 153 Cal.App.2d 806, 810; *People v. Collins* (1996) 45 Cal.App.4th 849, 863.) A writ of coram nobis is granted only when three requirements are met: "(1) Petitioner must 'show that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment[]'[;] . . . (2) Petitioner must also show that the 'newly discovered evidence . . . [does not go] to the merits of issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial.' . . . This second requirement applies even though the evidence in question is not discovered until after the time for moving for a new trial has elapsed or the motion has been denied. . . . (3) Petitioner 'must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ. . . . .'" (*People v. Shipman* (1965) 62 Cal.2d 226, 230.)

The prospect of facing false testimony at trial alone does not justify a defendant's decision to accept a plea bargain and will not support a later writ of habeas corpus. "It is settled in California that, absent extrinsic fraud or duress, a judgment predicated on perjured testimony or entered because evidence was concealed or suppressed cannot be attacked by a petition for a writ of *coram nobis*. [Citations.] . . . [¶] It is at the time of trial that a party 'must be prepared to meet

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concerning Officer Perez's well-known misconduct in other cases to support the trial court's conclusion concerning the falsity of the testimony.

and expose perjury then and there. . . . The trial is his opportunity for making the truth appear. If, unfortunately, he fails, being overborne by perjured testimony, and if he likewise [foregoes or is unable to challenge the outcome or] show the injustice that has been done him on motion for a new trial, and the judgment is affirmed on appeal, he is without remedy. The wrong, in such case, is of course a most grievous one, and no doubt the legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evil to be remedied. Endless litigation, in which nothing was ever finally determined, [could] be worse than occasional miscarriages of justice.'" (*Mendez v. Superior Court* (2001) 87 Cal.App.4th 791, 802-803, quoting *Pico v. Cohn* (1891) 91 Cal. 129, 134.) The existence of false witness testimony does not establish that respondent was coerced or tricked into accepting the plea agreement. Because he voluntarily pled nolo contendere, Penal Code section 1473, subdivision (b)(1), is not applicable nor does he fit the narrow category of persons for whom coram nobis is available.

II

We next examine whether respondent established a right to habeas relief based on one of the other grounds asserted in the petition: newly discovered evidence or the withholding of material exculpatory evidence. Concerning the latter ground, the court stated this was not "a *Brady* situation," referring to *Brady v. Maryland* (1963) 373 U.S. 83, the landmark case dealing with the prosecution's failure to disclose exculpatory evidence to the degree. We agree with the trial court's assessment. "The government has no obligation to produce information which it does not possess or of which it is unaware." (*Sanchez v. United States* (9th Cir. 1995) 50 F.3d 1448, 1453.) An individual police officer is not a representative of the prosecution. Respondent presented no evidence that at the

time of his conviction anyone other than Officer Perez was aware of the officer's now widely known misdeeds.

To obtain habeas relief based on newly discovered evidence, the petitioner must persuade the court that the evidence undermines the structure of the prosecution's case and points to actual innocence. The court in *In re Wright, supra*, 78 Cal.App.3d 788, discussed two related but distinct grounds for habeas relief also presented here: "Newly Discovered Evidence" and "Perjured Testimony—False Evidence." (*Id*. at pp. 802, 807.) To warrant habeas relief on the former ground, "new evidence must be such as to undermine the entire structure of the case upon which the prosecution was based; it must point unerringly to the petitioner's innocence and must be conclusive; it is not sufficient that the new evidence conflicts with that presented at the trial and would have presented a more difficult question for the trier of fact." (*Id*. at p. 802.) As we have seen, however, to warrant relief based on the latter ground, the petitioner need only show that the false evidence was introduced which was "'substantially material or probative on the issue of guilt . . . .'" (*Id*. at p. 808, quoting Pen. Code, § 1473, subd. (b)(1).) "The rule that to be sufficient for habeas corpus relief, the new evidence must undermine the entire structure of the prosecution's case applied only to newly discovered evidence; it never applied to perjured testimony." (*In re Wright, supra*, at p. 803.) The trial court did not reach the issue of whether the information concerning Officer Perez undermined the prosecution's case since the court was focused on section 1473, subdivision (b)(1) and materiality.

We conclude that the new information about Officer Perez's misconduct undermined his credibility but did not point to respondent's actual innocence. The remaining evidence established that Aggers agreed to procure narcotics for Officer Alberca; that he purported to page someone; that respondent came by within a few minutes; that respondent had an interaction with Aggers which involved touching

hands; that Aggers came back to Officer Alberca with several rocks of cocaine; and that respondent was found to be in possession of a pager after his arrest. Respondent's story as to why he was in the alley other than to supply drugs to Aggers was pronounced "suspect" by the trial court; Officer Alberca was deemed to be credible. On this record, taking Officer Perez's testimony out of the equation did not undermine the prosecution's case or point to respondent's innocence, and no habeas relief was warranted.

DISPOSITION

The trial court's order granting the writ of habeas corpus is reversed.

NOT TO BE PUBLISHED

CURRY, J.

We concur:

VOGEL (C.S.), P.J.

EPSTEIN, J.